Supreme Court, U.S.
FILED

0 212 72 FEB 2 8 2003

No. 02-

IN THE
SUPREME COURT OF THE UNITED STATES

ROSEMARY DePAOLI
and FRANK KRESOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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February 2003

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QUESTION PRESENTED

Is a person accused of criminal tax evasion entitled to a jury instruction, when there is evidence to support it, to the effect that if unreported receipts did not fall into a category of benefit taxable as "income" under the Internal Revenue Code, then the "deficiency" element of the offense has not been proven?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioners DePaoli and Kresock, and respondent United States). Petitioner knows of no related cases.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Rosemary DePaoli and Frank Kresock respectfully petition this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming their convictions and sentences for attempted income tax evasion.

OPINIONS BELOW

The Third Circuit's not-for-publication decision (per Greenberg, J., with Scirica, J., and Fullam, D.J.), was filed July 22, 2002. It is available *sub nom. United States v. DePaoli*, 41 Fed.Appx. 543, 90 AFTR2d 2002-5416, and 2002 WL 1609742. A copy is attached as Appendix A. The opinion of the United States District Court for the Middle District of Pennsylvania (McClure, J.) denying post-trial motions, is not published. A copy is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the petitioners' convictions on criminal tax charges was filed and entered on July 22, 2002. Appx. A; see *United States v. DePaoli*, 41 Fed.Appx. 543, 2002 WL 1609742. The petitioners' timely petition for rehearing was denied by the Third Circuit on September 26, 2002. Appx. C. On December 20, 2002, under No. 02A514 Justice Souter granted an

extension of time to and including February 24, 2003, for the filing of this petition. The petition is being filed by postmark on or before that date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE INVOLVED

The Internal Revenue Code of 1986 provides, in pertinent part:

> **Sec. 301. Distributions of property.**
>
> **(a) In general.**
>
> Except as otherwise provided in the chapter, a distribution of property (as defined in section 317(a)) made by a corporation to a shareholder with respect to its stock shall be treated in the manner provided in subsection (c).
>
> * * * *
>
> **(c) Amount taxable.**
>
> In the case of a distribution to which subsection (a) applies --
>
> **(1) Amount constituting dividend.** That portion of the distribution which is a dividend (as defined in section 316) shall be included in gross income.
>
> **(2) Amount applied against basis.** That portion of the distribution which is not a dividend shall be applied against and reduce the adjusted basis of the stock.

26 U.S.C. § 301.

Sec. 316. Dividend defined.

(a) General rule.

For purposes of this subtitle, the term "dividend" means a distribution of property made by a corporation to its shareholders --

(1) out of its earnings and profits accumulated after February 28, 1913, or

(2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

Except as otherwise provided in this subtitle, every distribution is made out of earnings and profits to the extent thereof, and from the most recently accumulated earnings and profits. To the extent that any distribution is, under any provision of this subchapter, treated as a distribution of property to which section 301 applies, such distribution shall be treated as a distribution of property for purposes of this subsection.

* * * *

26 U.S.C. § 316.

Sec. 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to any other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the

case of a corporation) or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7201.

STATEMENT OF THE CASE

Petitioners Rosemary DePaoli and Frank Kresock were convicted after a jury trial in the Middle District of Pennsylvania of attempted income tax evasion and related revenue offenses arising out of payment of their personal expenses by the professional corporation through which they practiced medicine. On appeal, they challenged the refusal of the trial court to instruct the jury on their theory of defense, namely that the funds they received were not, under conventional tax principles, taxable to them as "income."

a. ***Procedural History***

A nine-count indictment returned in February 1999, charged petitioners Rosemary DePaoli and Frank Kresock, a then-married couple both of whom are medical doctors, with federal tax offenses. CA3 App. 101-10. Count One charged that the defendants willfully attempted, on or about April 15, 1993, in violation of 26 U.S.C. § 7201, to evade and defeat the income tax due from them for 1992 by filing a false return which substantially understated their joint taxable income and the amount of tax due. CA3 App. 101-02. Count Two charged Dr. DePaoli with willfully making and subscribing a false corporate income tax return (Form 1120) for 1992 on behalf of Columbia Medical Group, Inc. ("CMG"), on or about March 15, 1993, which

"reflected substantial personal expenses concealed as business expenses and deductions," although the defendant "well knew and believed [that] the personal expenses reflected in the Form 1120 were not legitimate business expenses and deductions," in violation of *id.* § 7206(1). CA3 App. 103. Count III charged Dr. Kresock with willfully aiding and assisting in, counseling and advising, the filing of the false 1992 Form 1120 for CMG, in violation of *id.* § 7206(2). CA3 App. 104.

Counts IV-VI charged identical offenses for 1993, allegedly committed in 1994, CA3 App. 105-07, while Counts VII-IX charged the same offenses for 1994, allegedly committed in 1995. CA3 App. 108-10.

Trial consumed 17 days in November 1999. The jury returned verdicts convicting both defendants on all counts. On December 14, 1999, the defendants filed timely joint motions for judgment of acquittal and for a new trial. CA3 App. 91. Following briefing, Judge McClure filed a memorandum opinion and order on April 14, 2000, denying the post-trial motions. Appx. B.

On July 19, 2000, the court sentenced Dr. Kresock to serve 20 months' imprisonment, followed by three years' supervised release. He was also ordered to pay a $30,000 fine, to be paid in installments, and $300 in special assessments for his six counts of conviction. CA3 App. 59, 97. Dr. DePaoli was sentenced to serve 16 months, to commence upon Dr. Kresock's release,[1] followed by three years' supervised release. She was also ordered to pay a $30,000 fine during her supervised release and $300 in special assessments immediately. CA3 App. 49, 96.

[1] This was done so that their children would have at least one parent at home at all times.

Petitioners appealed to the U.S. Court of Appeals for the Third Circuit. On July 22, 2002, the Third Circuit filed its opinion and judgment (per Greenberg, J.) affirming petitioners' convictions. Appx. A.[2] By order of the district court, petitioners had been released after sentencing on bail pending appeal. Following the denial of rehearing by the court of appeals, Appx. C, Dr. Kresock was ordered to surrender for service of his sentence, and he has done so.

b. ***Statement of Facts***

In 1988, on the advice of their accountant, William J. Roll, CPA, petitioners Drs. Rosemary DePaoli and Frank Kresock, husband and wife, formed Columbia Medical Group, Inc. ("CMG"), a medical corporation. Through CMG, Drs. DePaoli and Kresock practiced medicine as the only dermatologist and cardiologist, respectively, in Columbia County, Pennsylvania, and environs. For tax years 1992, 1993, and 1994, Mr. Roll prepared, and signed as the preparer, corporate tax returns on IRS Form 1120 for CMG, joint personal returns on Form 1040 for Drs. DePaoli and Kresock, and inactive returns for CMG Enterprises, a general business corporation. After Mr. Roll signed the returns, Dr. DePaoli signed each corporate return and both of them signed each joint personal return.

Dr. DePaoli and Dr. Kresock each owned half the shares in CMG. In their personal capacities, they were also both employees, lessors and creditors of CMG. In 1992, they purchased, renovated and expanded a house

[2] The court below also summarily affirmed their sentences, as against the governments' cross-appeals. Appx. A17-18.

near Bloomsburg Hospital, and leased it to CMG for offices beginning on January 1, 1993. On the advice of Mr. Roll, the doctors became substantial creditors of CMG by making shareholder loans to the corporation at the end of each year to provide cash to "zero-out" CMG for tax purposes, that is, to provide cash to CMG to pay any apparent profits to the defendants in a form creating a deduction for CMG and income to the doctors personally. Roll performed the "zero-out" calculation each year and alone controlled the accounting for the shareholder loans. The year-end total balance of shareholder loans was $207,117.00 for 1992, $217,117.00 for 1993, and $179,817 for 1994, respectively.

Beginning in 1988, Mr. Roll designed and implemented the accounting procedures for CMG. Tr. 11/15, at 106-07; Tr. 11/16, at 90-94. For the first 14 months, Mr. Roll performed the expense coding. In 1992, 1993 and 1994, both doctors had check-signing authority for the CMG checking account, and both wrote checks on the accounts. While Dr. DePaoli by then coded most check stubs, with limited exceptions, the person writing the check filled out the stub, including the "memo" portion of the stub. The defendants' accounting expert concurred that Roll had designed a "good basic system," as long the entries were based on accurate information.

Both doctors were privy to discussions between Mr. Roll and Dr. Kresock about Kresock's interest in becoming a gun dealer (he had a federal firearms dealer license) and in collectible cars and motorcycles. Following such a discussion in 1992, petitioners formed CMG Enterprises, Inc. Although Mr. Roll prepared and signed, and Dr. DePaoli also signed, inactive returns for CMG Enterprises, Dr. Kresock and Mr. Roll took certain steps under its aegis.

The evidence tended to show that Dr. Kresock purchased thousands of dollars worth of guns with CMG funds. Both Dr. DePaoli and Dr. Kresock testified that they believed guns could appropriately be coded as "office supplies" if they were purchased as investments of the business's funds.

Extensive testimonial and business records evidence established transactions in which one or both of the doctors engaged during tax years 1992-94, for which CMG had paid. Some of these were of an essentially personal nature. There was evidence that a woman paid by CMG provided child-care and cleaning for the doctors at their residence four days a week and cleaned the medical practice premises one day a week. The prosecution evidence showed numerous automobile purchases and repairs conducted in whole or in part with corporate funds. Additionally, Dr. Kresock purchased several motorcycles.

Dr. Kresock also used CMG checks to purchase gold coins, assorted jewelry, and other collectibles from an antiques dealer and auctioneer. Dr. DePaoli signed many of the checks.

CMG checks were also used to pay several contractors or builders for work on the doctors' residences, including reconstruction services and materials to rebuild their lake house after a fire, maintenance of security systems at both their lake house and farm-residence, and miscellaneous installation or repair services. Corporate checks paid for residential lawn care and snow plowing. CMG purchased and deducted the cost of heating oil for the doctors' farm-residence. CMG also paid for electricity at the residences.

The prosecutor presented evidence of purchases of household appliances on several occasions with CMG checks, including a projection television set, a refrigerator, a microwave and a drier. There was also evidence that the doctors purchased home furnishings for a Florida property with CMG funds.

Dr. DePaoli and Dr. Kresock separately maintained "receipt bags" containing documentation of items for which they received reimbursement. The IRS civil auditor testified that she sampled Dr. DePaoli's receipt bags and discovered receipts for items like clothing, toys, a bike, groceries, toiletries, jewelry, gold coins, guns and payments to jewelry and Harley Davidson shops. Dr. DePaoli was cross-examined about similar receipts during her testimony. Tr. 11/23, at 135-58. The prosecutor also introduced evidence of approximately 40 altered receipts contained in Dr. Kresock's receipt bags.

Dr. Kresock received a total of $24,000 in non-CMG income in 1992, 1993, and 1994 for reading electrocardiograms and for public speaking, which was omitted from the couple's personal returns in each year. The government also presented evidence that both doctors received personal reimbursements for credit card charges which CMG, not they, had paid.

The prosecutor presented a summary witness -- IRS Special Agent Annmarie Clause -- whose exhibits listed expenditures by coding category, as those expenditures appeared on the tax returns. The government followed its summary witness with IRS Revenue Agent Chris Roginsky, who was "only qualified to testify as an expert on computations of income and tax liabilities." At first, he did not opine whether expenditures were "personal" *vel non* under the tax laws. Rather, he was asked to

assume that the items listed on the government's summary exhibits were "personal," not "business expenses." Later, however, on redirect, he abandoned that pretense and directly expressed his opinion that "The items which comprised the corporate adjustments represent expenses that are not business expenses. They were expenses -- personal expenses related to the shareholder, nonbusiness items. ... Had they been legitimate business expenses they would have been allowed."

Upon the assumptions and calculations of Agent Roginsky, the total adjustments to CMG taxable income were $44,850.60 for 1992; $91,604.23 for 1993, and $173,902.70 for 1994. The total taxes due from CMG were $14,045 for 1992, $31,017 for 1993, and $60,124 for 1994, according to this witness. The total adjustments to the individual joint taxable income were $75,307.60 for 1992, $221,190.39 for 1993 and $200,119.80 for 1994. After technical adjustments and credits, the tax deficiencies on individual joint returns were thus $22,865 for 1992, $70,802 for 1993, and $53,974 for 1994, the IRS agent testified.

The defendants' expert explained, on the other hand, that if the improperly coded items were instead properly accounted for, as forms of compensation, dividends, or repayments of loans to Drs. DePaoli and Kresock, they would all have been deductible or otherwise allowable, and CMG would still have had little or no tax liability, just as it reported. Indeed, the defense expert opined, the corporate had no "earnings and profits" from which to grant dividends to shareholders during the years in question. Tr. 11/19, at 112-13.

c. ***Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)*** The United States District Court for the Middle District of Pennsylvania had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASON FOR GRANTING THE WRIT

The Third Circuit's ruling in this case conflicts with decisions of the Second Circuit on the issue of whether there can be attempted evasion of "any tax imposed by this title," if as a matter of tax law the defendant's unreported receipts do not constitute taxable income.

The court below followed the Ninth, Sixth, and Eleventh Circuits in construing the provisions of 26 U.S.C. § 7201 to make immaterial in a tax evasion case the question whether unreported receipts constitute "income" as a matter of tax law. The opinion dismissed the contrary interpretation long adhered to by the Second Circuit. In doing so, the court below failed to follow this Court's cases guiding the construction of criminal statutes and the constitutional requirements for a conviction. Certiorari should be granted to resolve this inconsistency in the application of the most important criminal provision of the Internal Revenue Code.

The petitioners, Rosemary DePaoli and Frank Kresock, two medical doctors who were married to one another at the time, were convicted after a jury trial in the Middle District of Pennsylvania of filing false corporate tax returns for their professional corporation and of attempting to evade personal income tax, 26 U.S.C. §§ 7201, 7206(1), all related to the corporation's paying many of their personal expenses. At trial, they presented evidence that they had initially capitalized the corporation and had also lent it substantial funds. Their expert testified that under proper accounting the corporation did not generate a profit during the years in question.

One element of tax evasion is proof of a "deficiency," that is, a substantial tax due and owing. See *Sansone v. United States*, 380 U.S. 343, 351 (1965). Their theory of defense as to this element was to the effect that if the corporation had no "earnings and profits" in a given year, then funds they received from the corporation, as its shareholders, could not be counted as constructive dividends that year and had to be treated as the repayment of their loans to the corporation, which would not result in tax liability to themselves personally. They requested an instruction in support of this theory, which the court refused. The court below affirmed. Appx. A10-13. That decision places the Third Circuit in conflict with the published decision of the Second Circuit in *United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998), as the panel opinion acknowledges. Appx. A12.

The panel opinion concludes that the jury instruction the defendants sought at trial was legally incorrect, because the government did not have to prove their unreported receipts were, under the Code, taxable as "income." The "deficiency" element of a tax evasion charge is satisfied, according to the panel, whenever the defendant has "'actual command' over the property taxed," Appx. A13, quoting *United States v. Goldberg*, 330 F.2d 30, 38 (3d Cir. 1964). This is apparently so even if, under the Internal Revenue Code, that property is not treated as taxable income, as when a corporation disburses funds to its shareholders as repayment of a loan or as the return of capital. The decision quotes with seeming approval from a Ninth Circuit opinion which states that "the important element" is not whether any tax was legally due but rather is "the willful attempt to evade taxes." Appx. A12, quoting *United States v. Miller*, 545

F.2d 1204, 1214 (9th Cir. 1976). This Court should grant certiorari to reject the implications and logic of this holding, which would make intent alone a crime, even when the object of the attempt is not, in law, an offense.

The petitioners had at least four different relationships with their professional corporation, Columbia Medical Group ("CMG"). They were shareholders of the corporation; they were its founders, who invested funds to capitalize it, and continued to lend money as it needed cash; they were its landlords, owning the building where it operated; and they were its principal employees, each earning a paycheck. In relation to each of these capacities, money might flow from CMG to Dr. Kresock and/or Dr. DePaoli with different tax consequences in each situation -- dividends to a stockholder, return of capital or payment of interest to a lender, rental income to a lessor, wages or other benefits to an employee. The government's theory of personal tax evasion (Counts I, IV and VII) depended upon a *legal* conclusion that the value of any personal expenses of the petitioners which were covered by CMG was taxable to them as additional, non-wage income, and should not be treated either as constructive dividends or as a repayment of their loans to the corporation. The district court endorsed the prosecutor's theory in overruling the defendants' motion for judgment of acquittal and then in refusing their jury instruction. The endorsement of those rulings by the court below is mistaken.

One element of a tax evasion case under 26 U.S.C. § 7201 is that there have been a substantial tax due and owing, which is called a "deficiency." *Sansone*, 380 U.S. at 351; see generally *Spies v. United States*, 317 U.S. 492, 495-97 (1943) (analyzing meaning of "attempt to evade"

in 26 U.S.C. § 7201 by placing attempted criminal tax evasion in a hierarchy of tax enforcement devices). The district court instructed the jury that this was an element of the government's proof, CA3 App. 292, but failed to charge the jury, as requested by the defense, on a key contested issue about whether there was any such deficiency. It is undisputed that Dr. DePaoli and Dr. Kresock had established CMG and initially capitalized it, creating their status as shareholders, and further that they had lent the corporation substantial sums over the years. The district court erred in rejecting their argument that sums diverted from CMG for their benefit could be characterized, as a matter of tax law, as a return of capital or repayment of their loans. Neither of these would constitute taxable income to them, resulting in a jury question, at the least, about whether there was any deficiency in 1992, 1993 or 1994.

Petitioners requested that the jury be instructed in accordance with a line of Second Circuit authority which properly applies the Internal Revenue Code in this respect. CA3 App. 150. The trial court refused. *See* Appx. B4.[3] The court of appeals decision supports that

[3] Petitioners first raised this issue in support of a motion for judgment of acquittal with respect to the "deficiency" element of the evasion counts when the government rested its case. Judge McClure denied the motion by adopting the prosecutor's arguments, CA3 App. 204, and adhered to that view in rejecting the post-trial motions. Appx. B4. Those grounds were that the defendant's legal theory was wrong, and, in the alternative, that it was a disputed question of fact whether CMG had "earnings and profits," an underlying factual premise for the defendants' argument. As to the latter point, petitioners agree for purposes of this Petition with the prosecutor's Rule 29 position that the facts were in dispute;

ruling. Although other circuits have disagreed, the case on which the defense relied, *United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998), and the other cases which support it, including Judge Friendly's leading decision in *United States v. Leonard*, 524 F.2d 1076, 1083-84 (2d Cir. 1975),[4] are soundly reasoned and were correctly decided.

Those cases are based on this line of analysis: (1) whether a person has taxable income on a given set of facts is a question of statutory law; (2) under § 316 of the Internal Revenue Code, a "distribution" by a corporation out of its "earnings and profits" to one of its shareholders is a dividend, taxable as ordinary income in that year; (3) to the extent that the corporation does not have earnings and profits that year, the distribution to a shareholder, in his or her capacity as such, is characterized as a

_____(cont'd)

they therefore only pursue the legal issue whether a jury instruction should have been given. Ironically, after relying on a factual dispute to defeat the Rule 29 motion, the prosecutor in opposing the defendants' point for charge said this defense did not apply simply *because* the government had presented evidence on the subject, CA3 App. 170, disregarding that the defendants had presented conflicting evidence, which is exactly what created the need for the instruction. The opinion of the court of appeals could be read as accepting this illogical argument. Appx. A12 (distinguishing *D'Agostino* on the basis that there, "unlike in this case, the government conceded that the defendant's corporation had no earnings or profits").

[4] The opinion in *Leonard* recognized that the doctrine that there can be no constructive dividends without "earnings and profits," previously established in civil tax litigation, was also applicable in a criminal case. The panel held, however, that the defendant had offered insufficient evidence to entitle him to an instruction on the issue.

return of capital (reducing the basis of the shareholder's stock) or, if applicable, the repayment of any loan. 26 U.S.C. § 301(c).[5] Transactions of the latter sort are not taxable as "income."

Accordingly, at least where (as here) the defendants present some evidence that the corporation did not have "earnings and profits" during the year in question, *see* Tr. 11/19, at 112-13 (testimony of defendants' expert), and that the funds in question were not stolen or embezzled but rather were dispensed to them, as shareholders, under circumstances that could be (whether or not they were actually intended to be) accounted for lawfully -- both of which conditions apply here -- the defense is entitled to a jury instruction on the "no earnings and profits, no dividend" theory. *United States v. Bok*, 156 F.3d 157, 161-64 (2d Cir. 1998). The subjective intent of the shareholder/taxpayer is irrelevant to the "deficiency" element; the characterization of the transactions for tax purposes is established by statutory law. If there is no deficiency, there is no tax evasion,[6] regardless of the defendant's intent.

It simply makes no sense to say, as the Ninth Circuit did in the case quoted with apparent approval by the court below:

> The difficulty in *automatically* applying the constructive distribution rules in this case is that it completely ignores one essential

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[5] Sections 301 and 316 are set forth, in pertinent part, in the Statutes Involved part of this petition.

[6] There may nevertheless be a willfully false return, or some other offense. See *United States v. Peters*, 153 F.3d 445, 460-61 (7th Cir. 1998).

> element of the crime charged: the willful attempt to evade taxes, and concentrates solely on the nature of the funds diverted. The latter aspect is not the important element.

United States v. Miller, 545 F.2d at 1214 (emphasis original, as quoted at Appx A12).[7] A criminal defendant may not be convicted unless the government proves each and every element of the offense -- the prohibited act *and* the prohibited intent *and* any required surrounding circumstances. *Fiore v. White*, 528 U.S. 23 (1999); *Jackson v. Virginia*, 443 U.S. 307 (1979). No element can lawfully be dismissed as unimportant in this way.

An analogy may help make the point. Imagine a defendant charged with a violation of 18 U.S.C. § 2314, which makes it a federal offense to transport interstate stolen goods worth more than $5000. The government offers evidence at trial of the value of the goods, and that the defendant crossed a state line with them, as well as evidence that the defendant knew the goods he possessed were stolen. The defendant offers evidence questioning the value of the goods and the route taken. Imagine further that the defendant asks for a jury instruction on the interstate element and on the minimum dollar value element, but the trial court refuses, on the basis (as here) that the government's evidence supports the charges. One cannot imagine this Court issuing a decision stating:

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[7] The Third Circuit's prior decision in *United States v. Goldberg*, 330 F.2d 30, 38 (3d Cir. 1964), has sometimes mistakenly been characterized as authority contrary to *D'Agostino*. See, *e.g.*, *Bok*, 156 F.3d at 162. The decision below does not appear to endorse that error, although it finds the *Goldberg* decision supportive of its conclusion.

> The difficulty in automatically applying the interstate transportation rule and the $5000 minimum in this case is that it completely ignores one essential element of the crime charged: the knowing possession of stolen goods, and concentrates solely on the value of and route taken by the property stolen. Neither of the latter aspects is the important element.

In this case, the jury was denied an instruction on the defense theory with respect to one element of the offense -- the requirement that there be a deficiency in the tax owing. For lack of such an instruction to the jury in this case, the petitioners' tax evasion convictions cannot be affirmed. See *United States v. Mathews*, 485 U.S. 58, 63 (1988) (defendant's right to charge on theory of defense, when supported by some evidence).

The court below endorsed the view of three circuits that that the government in a tax evasion case does not have to characterize the defendant's gain as a particular type of income -- "additional salary, illicit bonuses, or commissions," *Davis v. United States*, 226 F.2d 331, 335 (6th Cir. 1955) -- for it to be taxable "income" under IRC § 61. Appx. A11. That is true as far as it goes, but nothing in the *Davis* opinion suggests that the defendant had any theory under which the funds he received from his wholly-owned corporation would not, in law, have been taxable as income. *See* 226 F.2d at 334-35 (reviewing defendant's contentions). Discussing these cases, the Ninth Circuit in *Miller*, the case cited by the panel here, recognized this precise point, distinguishing cases in which characterization of income was "unimportant," 545 F.2d at 1211, and contrasting them with a case

in which, as there, the defense raised an issue about the legal taxability of the surreptitious receipts. Yet the Ninth Circuit yet went on to hold that the distinction did not matter, as already quoted.

It is one thing to say that it is not necessary to characterize, in a criminal case, what sort of income the defendant had on which s/he evaded tax, and quite another to say it is unnecessary to determine whether the receipts on which the defendant failed to pay tax constituted "income" at all. After all, what the statute prohibits is any attempt to "evade or defeat *any tax imposed by this title*." 26 U.S.C. § 7201 (emphasis added).[8] If no tax is "imposed by this title," then an "attempt" to "evade" payment is no crime, for lack of any "deficiency."

The error made by the circuits which say that the government need not characterize the defendant's unreported receipts under the tax law is their failure to recognize that point as valid only if those receipts legally constitute "income" of some sort, as was true under any view of the facts in *Davis*.[9] But what constitutes "income" is itself, in the first place, a question of tax law. The

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[8] The full text of section 7201 is in the Statutes Involved.

[9] In *Bernstein v. United States*, 234 F.2d 475, 480-83 (5th Cir. 1956), the court of appeals declined to follow *Davis* and instead analyzed the defense theory of why the corporation had no earnings and profits, rejecting it as a matter of tax law before sustaining the sufficiency of the evidence and the trial court's refusal to charge on that theory. In *United States v. Williams*, 875 F.2d 846, 849-52 (11th Cir. 1989), overlooking *Bernstein*, the court "adopt[ed] the *Davis* rule," *id.* at 851, and quoted *Miller* extensively with approval.

defendant may have lived very well on loans, for example. But if a loan is genuine the receipt of that loan is not taxable as income, regardless of the defendant's "actual command over" the borrowed funds. Appx. A13. Likewise, in petitioners' case, their receipt of benefits from the corporation would not be taxable if those payments served to decrease the principal loan balance outstanding from them to CMG. The suggestion of some courts that the *D'Agostino* rule eliminates the element of intent to evade is nonsense. The Second Circuit's position simply honors the fundamental rule that *every* element of a crime must be proven (including "deficiency" in a tax evasion case), and that a defendant's intent, no matter how subjectively fraudulent, cannot alone create criminal liability if no crime, in fact and law, has otherwise been committed. A person who did not understand that gifts are not taxable income, and who with the subjective intent to evade tax went to extraordinary lengths to hide his receipt of gifts from the IRS, would still not be guilty of attempted tax evasion.

The evidence at trial in this case could have given rise, in the minds of a rational jury, to a reasonable doubt whether the value of the benefits derived by Drs. Kresock and DePaoli from CMG constituted, in law, a nontaxable return of capital or repayment of their loans, or on the other hand constituted taxable dividends or non-wage income. The jury was not bound to accept the conclusion of an IRS agent "expert" that the corporation had "earnings and profits" in each year, which was nothing more than a reflection of that agent's rejection of the defense expert accountant's analysis.[10]

[10] The IRS agent testified that CMG, the corporation, had profits in each of the years in question simply because its

Where, as in the instant case, there is a series of "distributions" by a corporation to its shareholders, the Internal Revenue Code establishes the rule that applies -- the distribution is income to the shareholder (called by law a "dividend") only to the extent that it comes out of "earnings and profits." IRC § 316(a). Otherwise, the distribution constitutes a non-taxable loan repayment or return of capital. IRC § 301(c). That is the issue the district court failed to put to the jury in this case. As the Second Circuit has pointed out, a contrary rule -- where the general law of income taxation does not apply if the defendant's intent is to evade taxes -- distorts the role of the intent element in a tax evasion case to the point that it impermissibly eliminates the requirement of proving the "deficiency" element at all. *D'Agostino*, 145 F.3d at 73. It also would make the government's burden less in a criminal case than in a civil tax fraud case, contrary to all reason. *Id.*[11]

_____(cont'd)
accountant did not issue a Form 1099 to report properly the corporation's payments and expenditures to and for the benefit of Drs. Kresock and DePaoli, who in addition to being its employees were also its shareholders (as well as its incorporators, capitalizers, and creditors). CA3 App. 199-200; CA3 Supp.App. 492-93. The jury was not bound to accept this testimony, which assumed the capacity in which the payments were received, and opined (contrary to law) that the tax consequences of the payments depended on what IRS form was filed rather than on their proper characterization as a matter of law, accounting standards and/or economic reality.

[11] In civil cases, the government must prove a deficiency under tax law, and then if it also proves fraud a substantial penalty is added. IRC §§ 6213, 6653, 7454(a).

The court below deepened a split in the Circuits by refusing to follow the Second Circuit's analysis as consistently reiterated for more than 25 years in *Leonard*, *D'Agostino*, and *Bok*. Three circuits hold otherwise. Resolution of this entrenched division of opinion deserves the attention of this Court. For these reasons, the Court should grant the requested writ of certiorari and reverse the judgment of the court below.

CONCLUSION

For the foregoing reasons, petitioners ROSEMARY DePAOLI and FRANK KRESOCK pray that this Court grant their petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming their tax evasion convictions.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
Attorney for Petitioners

February 24, 2003.

APPENDIX A

41 Fed.Appx. 543

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2212, 00-2238, 00-2422, and 00-2427

UNITED STATES OF AMERICA

v.

ROSEMARY DEPAOLI,

Appellant in No. 00-2212

UNITED STATES OF AMERICA

v.

FRANK KRESOCK,

Appellant in No. 00-2238

UNITED STATES OF AMERICA

Appellant in No. 00-2422

v.

FRANK KRESOCK

UNITED STATES OF AMERICA,

Appellant in No. 00-2427

v.

ROSEMARY DEPAOLI

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*545 On Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Crim. Nos. 99-cr-00026-1 and 99-cr-00026-2
Honorable James F. McClure, Jr., District Judge

Argued July 11, 2002
BEFORE: SCIRICA and GREENBERG, Circuit Judges, and FULLAM, District Judge*
(Filed July 22, 2002)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

I. BACKGROUND & PROCEDURAL HISTORY

**1 This criminal case is before the court on appeal and cross-appeal from judgments of conviction and

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* Honorable John P. Fullam, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

sentence. A grand jury returned a nine-count indictment charging husband and wife defendants Frank Kresock and Rosemary DePaoli with income tax evasion and related charges. In particular, the indictment charged each defendant with three counts of income tax evasion, in violation of 26 U.S.C. § 7201, relating to their join personal income tax returns for years 1992, 1993 and 1994, DePaoli with filing false corporate income tax returns for the same three years, in violation of 26 U.S.C. § 7206(1), and Kresock with aiding and abetting the filing of the false corporate returns, in violation of 26 U.S.C. § 7206(2).[1]

Appellants are medical doctors: Kresock is a cardiologist and DePaoli is a dermatologist. In 1988, they formed Columbia Medical Group; Inc. "CMG," a medical corporation. Each appellant owned one-half of the shares in CMG and both acted as the corporation's employees, lessors and creditors. William J. Roll, CPA, acted as their accountant and designed CMG's accounting procedures. The system provided for appellants to use checks and check stubs, adding expense codes, to record CMG's income and expenses. Appellants' practice was to send their accountant copies of the corporate check stubs, bank statements, and payroll information monthly.

In 1995, a routine IRS audit of CMG's 1993 corporate tax return led to a criminal investigation and ultimately the indictments and convictions involved here. The evidence at trial showed, inter alia, that appellants

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[1] The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and we have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

used CMG funds to purchase thousands of dollars worth of guns and jewelry, which were coded as "office supplies." Appellants also purchased numerous vehicles, including a Ferrari Testarossa *546 and Harley Davidson motorcycles, with corporate funds. Additionally they used CMG funds to renovate their vacation home, purchase jewelry, gold coins and many other personal items and services, including child care, home furnishings, groceries, diapers, children's toys, tampons and mustache wax. Many of Kresock's receipts were altered. Appellants did not declare the personal expenses they paid for with CMG funds as income on their personal tax returns. Instead the expenses frequently were treated as business-related items on CMG's corporate returns.

Evidence showed that appellants took steps to conceal the personal nature of the corporation's expenditures by falsely coding the check stubs to make the expenses appear business related. As an example, the purchase of a Harley Davidson motorcycle was coded as "equipment rental" for a cardiac echo machine. Defendants also omitted income on their personal tax returns from other sources, including fees from speaking engagements and for work performed at Bloomsburg Hospital. Overall the evidence of the appellants' guilt was overwhelming and, indeed, they understandably do not contend that the verdicts were against the weight of the evidence.

**2 At the trial in the district court, the jury returned a verdict of guilty as to both appellants on all charges. The court sentenced Kresock to serve 20-month concurrent custodial terms to be followed by three-year concurrent terms of supervised release and DePaoli to serve 16-month current custodial terms to be followed by

three-year concurrent terms of supervised release. DePaoli was to commence her custodial term when Kresock was released from imprisonment. The appellants have appealed and the United States has cross-appealed from the judgments insofar as they imposed sentences.

II. DISCUSSION

Appellants first contend that the district court erred in denying their pretrial motions for bills of particulars. We consider this point on an abuse of discretion basis. See United States v. Eufrasio, 935 F.2d 553, 575 (3d Cir.1991).

The purpose of a bill of particulars is to inform the defendant of the nature of the charges against him. See United States v. Addonizio, 451 F.2d 49, 63 (3d Cir. 1971). It is not intended to be a discovery device. See United States v. Smith, 776 F.2d 1104, 1111 (3d Cir. 1985). Thus, its purpose is to give the defendant only the information necessary to permit him to conduct his own investigation. See id. A trial judge has broad discretion in considering a motion for a bill of particulars, but the court should grant a motion seeking a bill of particulars when an indictment's failure to provide factual or legal information "significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial." United States v. Rosa, 891 F.2d 1063, 1066 (3d Cir. 1989).

In this case, the indictment sufficiently informed the appellants of the nature of the charges against them, and provided them with sufficient information to prepare an adequate defense and avoid prejudicial surprise at trial. For example, broken down by the years 1992, 1993,

and 1994, the indictment charged appellants with income tax evasion, subscribing to a false tax return, and aiding and assisting the preparation of a false tax return. Furthermore, the government provided appellants with considerable pretrial discovery and explained its theories of the case in writing in advance. In the circumstances, we are satisfied that appellants understood the nature of and, indeed, had considerable details of the charges against them. Accordingly, we cannot say that the court *547 erred in denying the motions for a bill of particulars.

Appellants argue that the jury instruction on the elements of income tax evasion was unclear and permitted personal income tax evasion convictions for acts not charged in the indictment.[2] Inasmuch as appellants did not object to the instructions during the charging conference or when the instruction was given, we consider this contention on a plain error basis. See Fed.R.Crim.P. 52(b); United States v. Dalfonso, 707 F.2d 757, 760 (3d Cir. 1983).

The appellants' particular objection is that the instructions failed to specify that the jury to convict was required to find that they knowingly filed personal tax returns each year which understated their joint taxable income. They argue that the jury instructions broadened the possible bases of conviction beyond that charged in the indictment. In support of their argument, appellants

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[2] The indictment charged that the defendants "did willfully attempt to evade and defeat a large part of the income tax due and owing by them ... by filing a false and fraudulent joint U.S. Individual Tax Return...." App. at 101.

quote a small portion of the charge in which the court stated that the appellants' tax evasion was attempted:

> **3 by filing and causing to be filed ... a false and fraudulent joint U.S. individual income tax return ... wherein it was stated that their joint taxable income for [1992] was the sum of $519,357 ... whereas ... [they knew the correct figure] was substantially in excess of that ... and that upon said additional joint taxable income a substantial additional tax was due.

App. at 290-91. Appellants complain that this instruction was ambiguous and that the jury may not have known that it was to "focus exclusively on the omission of income from the personal returns as the 'act of evasion.' " Appellants' Jt. Reply Br. at 4. Appellants point out that the record was "replete" with testimony about their conduct that the jury could have viewed as affirmative acts undertaken with the intent of tax evasion. They complain that nothing in the jury charge told the jury that it could convict on the personal evasion counts only if it found that they had attempted to evade income taxes by filing what they knew to be a false personal return which omitted income. This omitted income includes the imputed income appellants derived from the value of CMG's funds that were incurred for their personal benefit. See Appellants' Br. at 40.

We reject this contention as we are satisfied that the ambiguity of which appellants complain is not real and we see no reason to believe that the jury failed to understand that to convict it had to find beyond a reasonable doubt that appellants knowingly filed personal tax returns that understated their joint taxable income. We cannot believe that the jury, when it consid-

ered the charge, did not understand the elements of the offenses involved here.

Appellants claim that the court's charge to the jury on "willfulness" and "good faith" confused the jury into applying the "objective reasonableness" approach prohibited by Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). We review the instructions on this point on a plenary basis for legal correctness but on an abuse of discretion basis on matters of phrasing. See United States v. Zehrbach, 47 F.3d 1252, 1260 (3d Cir. 1995). Here we are satisfied that viewed in its entirety the court's charge on "willfulness" and "good faith" left no doubt that the defense of "good faith" need not be objectively reasonable. Moreover, the instructions clearly set forth that the burden of proving willfulness rested with the government.

*548 With regard to willfulness, the district court stated in part:

> [T]he government must prove beyond a reasonable doubt that each defendant acted willfully. To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty.... The word willfully as used in these instructions means a voluntary intentional violation of a known legal duty, in other words, the defendant must have acted voluntarily and intentionally with the specific intent to do something he or she knew the law prohibited, that is to say with intent either to disobey or to disregard the law.

**4 App. at 298-300.

With regard to the "good faith" defense, appellants argue that the district court led the jury to believe that it

was their burden to show good faith and that their belief must have been objectively reasonable. Appellants contend that the court's statement that "[i]f a person acts without reasonable grounds for belief that his or her conduct is lawful, it is for the jury to decide whether that person has acted in good faith ..." violated United States v. Powell, 955 F.2d 1206 (9th Cir. 1991).

The district court stated:

> Now, the good faith of a defendant is a complete defense to the tax charges in the indictment because good faith is simply inconsistent with willfully attempting to evade or defeat any tax, subscribing to a false return or aiding and assisting the preparation of a false tax return.
>
> While the term good faith has no precise definition, it means, among other things, an honest belief, a lack of malice, and the intent to perform all lawful obligations. A person who acts on a belief or on an opinion honestly held is not punishable under this statute merely because that honest belief is unreasonable or turns out to be incorrect or wrong.... If a person acts without reasonable grounds for belief that his or her conduct is lawful, it is for the jury to decide whether that person has acted in good faith in order to comply with the law or whether that person has willfully attempted to evade or defeat the tax, subscribed to a false return, or aid and assist the preparation of a false tax return.
>
> A person who believes that his or her tax return truthfully reports the taxable income

> and allowable deductions under the tax law acts in good faith and cannot be found guilty of willfully committing the offenses charged in the indictment.... The burden of proving good faith does not rest with the defendants because the defendants have no obligation to prove anything to you. The government has the burden of proving to you beyond a reasonable doubt that each defendant acted willfully.

App. at 301-04. In context, the court's instructions on willfulness and good faith did not mislead the jury as to the burden of proof and did not lead the jury into believing that the "good faith" defense required appellants to have an objectively reasonable belief in the propriety of their actions. Thus, the court's charge captures both the spirit and the letter of the law as set forth in Cheek and is not contrary to Powell.

Appellants unsuccessfully sought jury instructions to the effect that corporate expenditures for the benefit of shareholders are not treated as personal income until they exceed in amount all outstanding shareholder loans to the corporation and that a corporation cannot generate dividend income in the absence of earnings and profits. See United States v. D'Agostino, 145 F.3d 69 (2d Cir. 1998).[3] Appellants *549 assert that their receipt of

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[3] In D'Agostino, the taxpayers argued that they did not owe tax on diverted corporate funds because those funds were not constructive dividends. They asserted that the diverted funds could not be constructive dividends because the corporation had no earnings or profits in the years in question and therefore the funds constituted a reduction in their loan account or capital account with the corporation. Because there was no tax deficiency, there could be no violation.

benefits from CMG would not be taxable if those benefits served to reduce the principal amount of a loan balance outstanding. See Appellants' Jt. Reply Br. at 6. They add that their intent, no matter how subjectively fraudulent, cannot create liability if the did not receive income but instead were repaid for their loans. See id. Appellants contend that the D'Agostino instruction was necessary to show that there was no deficiency in tax and that the instruction they request would not have been contrary to our opinion in United States v. Goldberg, 330 F.2d 30, 38 (3d Cir. 1964). We review a refusal to give a requested instruction on an abuse of discretion basis, evaluating "whether the proffered instruction was legally correct, whether or not it was substantially covered by other instructions, and whether its omission prejudiced the defendant." United States v. Pitt, 193 F.3d 751, 755-56 (3d Cir. 1999).

**5 In Goldberg, we noted that the government need not fix a precise label on diverted funds since "substance controls over form, and taxation is concerned with the actual command over the property taxed." Id. at 38. A number of other courts have agreed that the government need not prove the character of diverted funds, rejecting the D'Agostino rationale. See United States v. Williams, 875 F.2d 846, 849-52 (11th Cir. 1989); United States v. Miller, 545 F.2d 1204, 1213-14 (9th Cir. 1976); Davis v. United States, 226 F.2d 331, 335-36 (6th Cir. 1955). These courts have stressed the distinction between a civil collection action and a criminal tax proceeding by noting that:

> In civil tax cases the purpose is tax collection and the key issue is the establishment of the amount of tax owed by the taxpayer. In a

> criminal tax proceeding the concern is not over the type or the specific amount of tax which the defendant has evaded, but whether he has wilfully attempted to evade the payment or assessment of tax.
>
> The difficulty in automatically applying the constructive distribution rules in this case is that it completely ignores one essential element of the crime charged: the willful attempt to evade taxes, and concentrates solely on the nature of the funds diverted. That latter aspect is not the important element. Where the taxpayer has sought to conceal income by filing a false return, he has violated the tax evasion statutes.

Miller, 545 F.2d at 1214; see also Williams, 875 F.2d at 850. Indeed, the Court of Appeals for the Second Circuit has acknowledged that its view in D'Agostino does not state the prevailing rule. See United States v. Bok, 156 F.3d 157, 162 (2d Cir. 1998).

We also point out that in D'Agostino, unlike in this case, the government conceded that the defendant's corporation had no earnings or profits. Here, there was evidence supporting a conclusion that, when adjustments were made for personal items falsely labeled as business expenses, CMG showed a profit for each year charged in the indictment. Additionally, even though appellants complain that the diverted funds could have been accounted for lawfully as return of capital or repayment of a loan and that there would have been no or very little taxable income if corporate income diverted by appellants had been accounted for by issuance of 1099 forms, there was no evidence from which it could be inferred

that the diverted income was accounted for in this way. Accordingly, *550 we will not stray from Goldberg, which requires the government to prove the taxpayer's "actual command" over the property taxed rather than fix a precise label or prove the character of the diverted funds.

Appellant Kresock filed a motion to recuse the district judge, who, during the pretrial conference, revealed to counsel that he and William Roll, appellants' CPA, belonged to the same church and were involved in church activities. We consider the appeal from the court's denial of the motion on an abuse of discretion basis. See Securacomm Consulting, Inc. v. Securacom, Inc., 224 F.3d 273, 278 (3d Cir.2000).

**6 Under 28 U.S.C. § 455:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) [The judge] shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

In considering this issue we determine whether an objective observer reasonably might question the judge's impartiality. See Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026, 1042 (3d Cir. 1997). In its opinion declining to recuse the court noted, quoting Hadler v. Union Bank and Trust Co., 765 F.Supp. 976, 977 (S.D.Ind. 1991) (internal quotation marks omitted) that "it is

beyond the bounds of reasonable supposition to infer that a judge would abandon his obligation of impartiality merely because a friend is a witness in a case in which that judge is presiding. That is why practically every federal court faced with arguments for recusal based on friendship has found recusal unnecessary." App. at 22. In this case, the judge and the witness did not have a close personal relationship. Instead, the judge merely was acquainted with the witness through church involvement. Moreover, we see no reason to believe that the judge's acquaintance with the witness affected the outcome of sentencing. Indeed, we note that neither appellant has appealed from his or her sentence, which, considering the situation in which they were in, were favorable to them. In fact, it is the government which is appealing from the sentences. Overall, we are satisfied that the district court properly denied the motion to recuse.

Appellants argue that the court committed plain error in allowing testimony from IRS agent Christopher Roginsky who was a summary witness who observed the trial and testified as to the amount of criminal tax due and owing from the defendants based on the evidence. See Fed.R.Crim.P. 52(b). Appellants argue that they received inadequate pretrial notice of Roginsky's testimony and that his testimony violated Fed.R.Evid. 704(b).

Before trial, appellants filed an unsuccessful motion under Rule 16(d)(2) to exclude Roginsky's testimony to the extent that he proposed to testify as an expert on tax preparation. The government, however, identified Roginsky as a summary witness who would offer a summary of tax calculations at the

end of the government's case, based on the evidence presented at trial. Appellants complain that Roginsky's testimony went beyond his role as a summary witness when he offered expert opinion on their intent to avoid taxes.

On cross-examination appellants tried to create the impression that there would have been no corporate tax due and owing if their accountant simply had issued form 1099s to appellants on behalf of the corporation. Thus, the line of questioning suggested that corporate profit, and appellants' resulting liability, were consequences *551 of the accountant's error. On redirect examination, the government asked the following questions to rebut the suggestion that the accountant was responsible for creating corporate profit:

> **7 Q: Now, Mr. Borden asked you a couple of questions about if there had been 1099's issued and if things had been done a certain way what the effect would have been on the corporate tax; is that correct?
>
> A: Yes, I remember those questions.
>
> Q: Why is it that you calculated a corporate tax due and owing in this case?
>
> A: The items which comprised the corporate adjustments represent expenses that are not business expenses. They were expenses -- personal expenses related to the shareholder, nonbusiness items. Had the shareholders had the intention of deducting them as business expenses, they would have been -- wait, let me step back. Had they been legitimate business

expenses they would have been allowed. Had the shareholders' intention been otherwise, that was additional compensation, they would have followed that route when they were coding the checks, placing them in the general ledger, et cetera.

Q: Okay, and that wasn't done here, correct.

A: No, it was not.

Supp. app. at 492-93.

Although they did not object at the time, appellants now contend that Roginsky's answer was highly prejudicial and that he improperly expressed an opinion as to their intent. See Appellants' Br. at 74 (citing United States v. Watson, 260 F.3d 301, 308 (3d Cir. 2001) for proposition that reversal is required when expert offers opinion about defendant's intention). The government responds that in the disputed testimony, Roginsky merely stated that appellants' treatment of the funds from CMG was inconsistent with an intention to consider those payments to be compensation as appellants had suggested, and that the opinion was not tantamount to an opinion regarding appellants' willfulness to evade income taxes. In any event, it points out that Roginsky's testimony covers 75 transcript pages and that the challenged testimony was not repeated.

In fact, from the start of Roginsky's testimony, the government made clear that he had been asked to assume that expenses paid by CMG to appellants were personal rather than business expenses. The fact that he began with this assumption and that his testimony was not intended to prove the intent of appellants was repeated throughout his testimony. See Br. of Appellant/ Cross-Appellee at 71-73 (citing pages of transcript).

Thus, even if a single, isolated portion of the agent's testimony was improper, it would not require reversal.

To reverse a conviction under Rule 52(b), plain error must affect substantial rights. See United States v. Olano, 507 U.S. 725, 735, 113 S.Ct. 1770, 1778, 123 L.Ed.2d 508 (1993). The appellant bears the burden of persuasion, and "[i]n most cases," the substantial rights requirement "means that the error must have been prejudicial: [i]t must have affected the outcome of the district court proceedings." Id. at 734, 113 S.Ct. at 1778. Here, the testimony was a brief statement in the midst of lengthy testimony and the agent's statements did not directly address appellants' intention to evade the payment of income taxes. In the circumstances, it is difficult to characterize the error as plain.

**8 Moreover, even if the error was plain, there has been no specific showing of prejudice. We cannot believe that in the face of the overwhelming evidence supporting *552 the convictions that the statement affected the outcome of the trial. Thus, appellants are not entitled to a new trial: the alleged error was not of constitutional dimension, and there is a "high probability" that the error did not contribute to the conviction. See United States v. Molina-Guevara, 96 F.3d 698, 703 (3d Cir. 1996). The error was harmless.

III. CONCLUSION

We have reviewed all the other points raised by the parties, including those the government has advanced on the cross-appeal, and we are satisfied that we have no basis to reverse by reason of any of them. Consequently, we will affirm the judgments of conviction and sentence entered July 20, 2000.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THE UNITED STATES OF AMERICA	:	No. 4:CR-99-0026-01
v.	:	No. 4:CR-99-0026-02
ROSEMARY DEPAOLI and FRANK KRESOCK,	:	(Judge McClure)
Defendants.	:	

FILED
WILLIAMSPORT, PA
APR 14 2000
MARY E. D'ANDREA, CLERK
PER /bp
DEPUTY CLERK

MEMORANDUM
April 14, 2000

BACKGROUND:

On February 2, 1999, a federal grand jury sitting at Scranton, Pennsylvania, returned a nine-count indictment charging husband and wife defendants, Frank Kresock and Rosemary DePaoli, with income tax evasion and related charges. On March 31, 1999, both defendants appeared at arraignment and entered pleas of not guilty. A jury trial commenced on November 3, 1999 and continued for seventeen days. On December 3, 1999, the jury returned a verdict of guilty as to both defendants on all charges. Sentencing for both defendants is scheduled for May 18, 2000.

The court now has before it a motion for a new trial and a motion for judgment of acquittal pursuant to FED. R. CRIM. P. 33 and 29(c), respectively, filed on behalf of both defendants. The motions are fully briefed and ripe for disposition. For the reasons which follow, we will deny the motions.

[2]

DISCUSSION:

I. Sufficiency of the Evidence

Defendants set forth five arguments for the court to set aside the jury verdict on"the basis of insufficiency of the evidence. Insufficiency of the evidence claims place a heavy burden on a defendant. United States v. Davis, 183 F.3d 231, 238-39 (3d Cir. 1999) (citing United States v. Gonzalez, 918 F.2s [sic] 1129, 1132 (3d Cir. 1990)). The court must accept the evidence presented in the light most favorable to the government as the prevailing party. United States v. Salmon, 944 F.2d 1106, 1113 (3d Cir. 1991), cert. denied sub nom. Washington v. United States, 502 U.S. 1110 (1992). Moreover, the conviction must stand if a rational trier of fact could have found the defendant guilty beyond a reasonable doubt, and the verdict is supported by substantial evidence. United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995) (citing United States v. Gonzales, 918 F.2d 1129, 1132 (3d Cir. 1990), cert. denied, 498 U.S. 1107 and cert. denied, 499 U.S. 982 (1991)). As stated by the Third Circuit, "[t]he jury may make reasonable inferences from the evidence presented; the evidence need not unequivocally point to the defendant's guilt as long as it permits a finding of guilt beyond a reasonable doubt." Davis, 183 F.3d at 238 (citing United States v. Pungitore, 910 F.2d 1084, 1129 (3d Cir. 1990)). The prosecution can bear this

burden of proof entirely through circumstantial evidence. United States v. Torres, 862 F.2d 1025, [*3]1027 (3d Cir. 1988) (citing, inter alia, United States v. Wexler, 838 F.2d 88, 90 (1988)).

Defendants first argue that the evidence was insufficient to prove their wilfulness [sic] beyond a reasonable doubt. We disagree. As stated in the government's brief, the court in detail instructed the jury on the definition of the term "willfully." Because a defendant's willfulness can often only be proven by circumstantial evidence, the court in its instruction stated, "By way of illustration only, willfulness may be inferred from conduct such as making false entries or alterations, or false documents, concealing assets, covering up sources of income or any conduct the likely effect of which would be to mislead or to conceal ..." The evidence produced at trial, viewed in the light most favorable to the government, establishes that various personal items were purchased by defendants with corporate monies. Moreover, the evidence shows that some of these corporate checks were improperly designated with false codes. While defendants argue that this evidence, by itself, does not prove intentional conduct, we believe that the jury could properly infer from this conduct that defendants acted wilfully [sic]. Indeed, given the large number of falsely coded items and the pattern of miscoding these items over the years in question, we believe there was a fully sufficient basis in the evidence for the jury to find beyond a reasonable doubt that defendants acted "willfully."

[*4]Second, defendants argue that the government failed to prove a tax deficiency for the years in question. We disagree. Viewing the evidence produced

a trial in a light most favorable to the government, we believe that the evidence shows that defendant shad taxes due and owing for the relevant years in question. Again the government presented evidence of numerous personal items paid with corporate checks, as well as evidence of miscoding these persona items as business expenses. Defendants again misplace their reliance on U.S. v. D'Agostino, 145 F.3d 60 (2d Cir. 1998). The court on the record rejected defendants' argument in denying their motion for judgment of acquittal at the conclusion of the government's case-in-chief. For the reasons previously stated therein, the court finds that there was sufficient evidence for the jury to find beyond a reasonable doubt the existence of a tax deficiency.

Third, defendants argue that the government failed to prove the affirmative act of evasion alleged in the indictment. We disagree. The only affirmative act alleged in the indictment is the "filing or causing to be filed" of "a false and fraudulent" personal tax return for the years in question. Defendants argue that the evidence fails to prove that the personal tax returns were "false and fraudulent." Viewing the evidence in the light most favorable to the government, for the reasons previously stated with respect to defendants' first two arguments, we find that there was sufficient evidence for the jury to find beyond a [*5]reasonable doubt that defendants committed an affirmative act of evasion for the relevant years.

Fourth, defendants argue that the evidence failed to prove that each tax return contained a false statement as to a material matter. Specifically, defendants argue that the government failed to produce any expert testimony regarding the applicable provisions of the Internal

Revenue Code in determining the distinction between personal expenses and business expenses and deduction [sic]. We find defendants' argument to be without merit.

Again, the evidence produced at trial establishes that defendants paid for personal items such as baby formula, diapers, moustache wax and vacation home furniture with corporate checks and falsely coded these items as business expenses. Given defendants' sophistication, we find it untenable for them to argue that they were unaware of the personal nature of these items. Moreover, as stated in the government's brief, we agree that defendants' conduct in attempting to mischaracterize these items shows that they were indeed aware of the personal nature of these items. For these reasons, we find that there was sufficient evidence for the jury to find beyond a reasonable doubt that the corporate tax returns were fraudulent and false as to a material matter,

Defendants' last argument on the basis of insufficiency of the evidence relates to the government's alleged failure to prove that defendant Frank Kresock aided and abetted the preparation of false corporate tax returns. Again, we find defendants' argument [*6] to be without merit. The evidence produced at trial shows that defendant Kresock falsified corporate records and altered documents. Significantly, the government produced expert testimony that defendant Kresock altered receipts to increase expenses for which he received reimbursements from the corporation. Viewing the evidence in the light most favorable to the government, we find that there was sufficient evidence for the jury to find beyond a reasonable doubt that Kresock aided and abetted the preparation of false corporate tax returns.

II. Unanimity of Jury Verdict

Regarding the tax evasion charges, defendants contend that the court should have instructed the jury that it had to be unanimous in finding a particular act of evasion in violation of 26 U.S.C. § 7201.[1] However, unlike the three counts (counts II, V and VIII) charging DePaoli with subscribing to a corporate tax return which was false as to a particular "material matter," the tax evasion charges (counts I, IV and VII) specifically identify one affirmative act of evasion, that is, "by filing and causing to be filed" "a false and fraudulent" individual tax return. It follows, then, that the jury was unanimous in finding that defendants committed the act of evasion as to count I, IV and [*7] VII. We disagree with defendants that the falsity of the personal returns was dependent upon the falsity of the corporate returns. In fact, the counts relating to the personal tax returns are separate and distinct from the counts relating to the corporate returns. Therefore, the court does not believe that a unanimity instruction was warranted as to the evasion counts.

Moreover, we agree with the government that assuming a unanimity charge should have been given, we do not believe the court's failure to do so constitutes reversible error. As stated by the government, defendants do not assert that they made a request for a unanimity charge or objected to a charge that did not

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[1] Three counts of the indictment charge Rosemary DePaoli with subscribing to a corporate tax return which was false as to a "material matter." The court instructed the jury that it had to be unanimous as the particular "material matter" which was false or fraudulent.

contain one. Indeed, after careful review of defendants' proposed points for charge and supplemental points for charge, the court is unable to ascertain [sic] such a request or objection. Therefore, we agree that because defendants did not voice the objections that they now raise before the jury retired, their claim of error is subject to plain error review. Jones v. United States, 527 U.S. ___, ___, 144 L.Ed.2d 370, 377 (1999). Under that review, relief is not warranted unless there has been (1) error, (2) that is plain, and (3) affects substantial rights. Jones, 144 L.Ed.2d at 387 (citing Johnson v.United States, 520 U.S. 461, 467 (1997)). It is a rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made at trial. Id. (citing Henderson v. Kibbe, 431 U.S. 145, 154 (1977)). As stated by the United States Supreme Court, error is plain error if it "seriously affect[s] [*8] the fairness, integrity, or public reputation of judicial proceedings." Id. (citing United States v. Olano, 507 U.S. 725, 732 (1993)).

Therefore, assuming defendants were entitled to a unanimity instruction, the court finds that such error was not plain error as a matter of law. Notwithstanding the instruction, the record is replete with evidence of defendants' affirmative acts of evasion, and a rational jury could, therefore, find defendants guilty beyond a reasonable doubt.

III. Weight of the Evidence

Defendants also move the court for a new trial. Defendants assert that they are entitled to a new trial because the jury[verdict was against the weight of he evidence. We disagree.

According to Fed.R.Crim.P. 33, a trial court may grant a new trial if the interests of justice so require. Defendants cite to United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980), for the proposition that a court may grant a new trial if "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred ..." However, we agree with the government that a new trial should be granted "only upon demonstration of adverse effects on substantial rights of a defendant," United States v. Cooks, 52 F.3d 101, 103 (5th Cir. 1995), and that the decision to grant a new trial is at the discretion of the trial court. Id.

[*9] Here, we believe that based on the evidence presented at trial, a rational jury could have found defendants guilty of all charges beyond a reasonable doubt. Although defendants maintain that neither of them "had any training or experience with tax matters," the court believes that the rather commonplace items (e.g. diapers and baby formula) for which the government presented evidence of false coding as business expenses, required no expertise in tax matters above that of a layperson. Moreover, the testimony produced at trial from defendants' own witnesses indicates defendants' overall sophistication and intelligence. Indeed, Rosemary DePaoli's former college roommate stated that DePaoli was "brilliant."

Moreover, we find defendants' argument regarding their reliance on their C.P.A., William Roll, to be unfounded. In fact, the evidence produced at trial shows that defendants misled Roll as to the nature of their personal expenses by falsely coding many of those items as business expenses. We believe that the record is replete with evidence of defendants' guilt. Accordingly,

we find that no injustice occurred and that there were no adverse effects on the substantial rights of defendants as a result of the jury's verdict.

IV. Recusal of Presiding Judge

Defendants contend that the court should grant a new trial because the court erred in denying defendants' pretrial motion for recusal of the presiding judge. Defendants rely on their [*10]brief filed in support of that motion. For the same reasons outlined in our order dated October 21, 1999, we find that the court did not err in denying defendants' motion for recusal. Moreover, the court finds that the court's decision to deny defendants' motion for recusal resulted in no miscarriage of justice to justify a new trial. The jury was free to weigh the credibility of William Roll's testimony in light of all the evidence presented at trial.

Additionally, the court fails to see how it will need to weigh William Roll's credibility at sentencing. After all, defendants, not William Roll, will be sentenced on these charges. The evidence of record speaks for itself and there is no need at this juncture to weigh anyone's credibility.

V. Bill of Particulars

Defendants contend that the court should grant a new trial because the court erred in denying defendants' motion for a bill of particulars. The court incorporates herein its memoranda and orders dated August 30, 1999 and October 4, 1999, denying defendants' motion for a bill of particulars and motion for reconsideration of the court's denial of the motion for a bill of particulars, respectively.

The court finds that no miscarriage of justice occurred as a result of our previous orders of August 30, 1999 and October 4, 1999. As stated by the government, the proof offered in the government's case-in-chief mirrored the representations made to [*11]the court and to defense counsel in response to the pretrial motion for a bill of particulars. Indeed, the information that defendants seek in their post-trial brief was either spelled out by the government or was readily available or obvious to defendants. For example, defendants ask, "What acts allegedly constituted "willful" conduct and in what respect were such acts willful[?]" The government, repeatedly, supplied defendants with examples of acts which it believed constituted willful conduct. In the government's brief filed on September 28, 1999, it stated: "The evidence at trial will show documents were altered and/or manufactured in order to inflate reimbursements to Dr. Kresock for alleged expenses related to his business. These falsely inflated reimbursements were then written off as business expenses." It is ingenuous for defendants to contend that they were unaware of their conduct which constituted the very nature of the charges against them.

In sum, the court finds that the information available to defendants before trial was sufficient, in fact considerable, with which to prepare an adequate defense. As there were no surprises offered by the government at trial, we find that a new trial is not warranted here.

VI. Motion for Continuance

Defendants contend that the court should grant a new trial because the court erred in denying their motion to prohibit the government from introducing the testimony of IRS agent [*12]Christopher Roginsky's testi-

mony [sic], or in the alternative, to continue the trial pursuant to FED. R. CRIM. P. 16(d)(2). Rule 16 governs discovery and inspection and provides for the government's disclosure to defendants of a written summary of expert testimony intended to be used at trial. FED. R. CRIM. P. 16(a)(1)(E). Further, the rule provides for the court to grant, inter alia, a motion for a continuance upon a party's failure to comply with the rule. FED. R. CRIM. P. 16(d)(2).

As a starting point, evidentiary matters are within the discretion of the trial court and are subject to review for abuse of discretion. See United States of America v. Hashagen, 816 F.2d 899, 907 (3d Cir. 1987)). Here, we find that the court did not abuse its discretion by allowing the testimony of Christopher Roginsky or in denying defendants' motion for a continuance. Moreover, we find that the government complied substantially with the requirements as set forth in Rule 16. Indeed, defendants were notified on several occasions of the government's plan to have Agent Roginsky observe the trial and offer summary testimony based on the evidence presented at trial. Moreover, the government in its brief highlights two letters that were addressed and sent to defense counsel, indicating the extent of Agent Roginsky's testimony. We agree with the government that defendants had sufficient advance notice of its intention to call Agent Roginsky as well as the sum and substance of Agent Roginsky's testimony. The court finds that there was no abuse of [*13]discretion in allowing Agent Roginsky's testimony or in denying defendants' motion for a continuance.

VII. Altered Documents

Defendants contend that the court should grant a new trial because it erred in allowing the altered documents evidence to be presented by the government at trial. We find no error in allowing the government to present its altered documents evidence. Contrary to defendants' assertion that nothing in the record indicates that the alterations were "fraudulent," the court believes that the evidence was proper circumstantial evidence from which a rational jury could infer willfulness on the part of Frank Kresock.

Defendants further argue that the probative value of the evidence was outweighed by its prejudicial effect. Rule 403 provides as follows:

> Although relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

F.R.E. 403.

Applying this balancing test to the evidence at hand, we do not believe that the probative value was outweighed by the prejudicial effect. We agree with the government that evidence is not excludable simply because it is damaging or prejudicial to a defendant's case; it must be unfairly prejudicial. United [*14]States v. McNeese, 901 F. 2d 585, 599 (7th Cir. 1990). As to a criminal defendant, "Rule 403's term 'unfair prejudice' speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on an improper basis rather than on proof specific to the

offense charged." Old Chief v. United States, 519 U.S. 172 (1997). Not only is the evidence of altered documents clearly relevant, it is also specific to the offense charged. While the evidence was prejudicial, it was not unfairly prejudicial. Accordingly, we find no error in permitting the government to present its altered documents evidence.

VIII. Sale of the Corvette

At trial, the government elected not to include the claimed loss on the sale of the Corvette in its tax due and owing for the tax year 1993. Defendants at trial made a motion for a mistrial which the court denied. Defendants in their brief argue that since the claimed loss on the sale was not calculated in the tax due and owing for 1993, the evidence was irrelevant and prejudicial and "tended to prove nothing."

The court does not believe it erred or abused its discretion in permitting testimony regarding the sale and repurchase of the Corvette. The government at trial intended to show that the transaction in which Frank Kresock sold and repurchased the Corvette at the car dealership was a sham transaction and that [*15]based upon this sham transaction, Columbia Medical Group declared a loss in excess of $50,000 on its 1993 tax return.

However, William Roll, who testified that he was never told by defendants that they repurchased the vehicle, found subsequent to his testimony the fax from defendants which indicated that they had repurchased the Corvette. Therefore, the government, while still alleging this was a sham transaction, agreed to exclude the claimed loss on the sale of the Corvette in its tax due and owing for the tax year 1993.

Notwithstanding Roll's position regarding the sale, the court believes it was well within its discretion to permit the government to present evidence regarding the transaction. Moreover, we believe that the evidence has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would without the evidence, in accordance with F.R.E. 401. That is, we believe the evidence has a tendency to make the existence of Frank Kresock's participation in aiding and abetting the filing of a false tax return for CMG for 1993 more probable than it would without the evidence. Accordingly, we find that the court did not err in permitting the government to present evidence regarding the sale and repurchase of the Corvette.

IX. Exclusion of Evidence

Defendants contend that the court should grant a new trial [*16]because the court erred in various evidentiary rulings during the trial, namely the court's decision to exclude the following: a videotape of their premature baby which was made while the baby was in the neonatal intensive case unit; testimony from Rosemary DePaoli regarding how the IRS investigation devastated their lives and required them to relocate to Arizona; testimony from Frank Kresock regarding the administrative appeals process and his testimony in front of the Republican National Congressional Committee on tax reform.

As previously stated, evidentiary matters are within the discretion of the trial court. The court at trial stated succinctly the reasons for sustaining the government's objections to the aforementioned evidence, and we incor-

porate by reference those reasons as stated on the record. By way of amplification, the court finds that this evidence, separately and in its totality, was properly excluded because the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury in accordance with F.R.E. 403. The court finds that the videotape of defendants' son has no probative value bearing on the issue of defendants' guilt or innocence on the tax-related charges of the indictment. Indeed, the court finds that the videotape of a premature baby hooked up to tubes and monitors is unduly prejudicial and serves only to confuse and garner sympathy from the jury.

[*17]For these same reasons, the court finds that the probative value of the particular testimony defense counsel wished to elicit from DePaoli and Kresock was substantively [sic] outweighed by its unfairly prejudicial effects and confusion of the issues to the jury.

X. Jury Instructions

Lastly, defendants contend that the court should grant a new trial because the court erred in its instructions to the jury. Specifically, defendants take issue with the court's instructions on the meaning of "willfulness," "good faith," and "reliance upon certified public accountant." A court errs in refusing a requested instruction only if the omitted instruction is correct, is not substantially covered by other instructions, and is so important that its omission prejudiced the defendant. Davis, 183 F.3d 231 at 250 (citing United States v. Smith, 789 F.2d 196 (3d Cir. 1986)). The root question after instructions have been given is whether the charge as a whole "fairly and adequately" submits the issues to the jury. Waldorf

v. Shuta, 896 F.2d 723, 740 (3d Cir. 1990). Absent error of law, decisions as to proposed jury instructions are subject to review for abuse of discretion. Bolden v. Septa, 21 F.3d 29, 33 (3d Cir. 1994) (citing, inter alia, Salmon, 944 F.2d at 1125)).

With this standard in mind, the court finds that there was no abuse of discretion in the instructions as they were presented to the jury. As to the charge on "willfulness," defendants [*18]contend that the court's charge did not reflect the "spirit or letter" of the law as set forth in Cheek v. United States, 498 U.S. 192 (1991). We disagree. Defendants in their charge set forth three separate proposed charges entitled "Willfulness Defined." In these proposed charges, defendants cite the Cheek case in the following two instances:

> Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct required under the tax law.
>
> ♦ ♦ ♦ ♦
>
> "Willfulness," as applied in a criminal tax case, requires that the Government prove beyond a reasonable doubt that the law imposed a duty on the Defendant, that the Defendant knew of this duty, and that the Defendant voluntarily and intentionally violated that duty.

The court's instruction on "willfulness" provided as follows:

> [t]he word "willfully," as used in these instructions means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally with the specific intent to do something he or she knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

It is clear that the court's instruction captures the spirit and letter of the law on "willfulness" as set forth in Cheek. In fact, the court's instruction contains almost identical language to the paragraph proposed by defendants on the requirements of the word "willfulness." The court finds that defendants' [*19]instruction is substantially covered by the court's instruction and that the charge as a whole fairly and adequately submits the issue of "willfulness" to the jury.

As for the court's charge on "good faith," the court again finds that there was no abuse of discretion. Defendants contend that the court's instruction "did not make clear" that defendants need not hold an objectively reasonable belief. In support of their argument, defendants cite to United States v. Powell, 955 F.2d 1206 (9th Cir. 1991).

As a starting point, we note that Powell is not binding authority as the law in this circuit. Further, the court finds that our instruction on "good faith" indeed made clear to the jury that defendants need not hold an objectively reasonable belief. The court's charge, in pertinent part, provided as follows:

> While the term "good faith" has no precise definition, it means, among other things, an honest belief, a lack of malice, and the intent

> to perform all lawful obligations. A person who acts on a belief or on an opinion honestly held is not punishable under this statute merely because that honest belief is unreasonable or turns out to be incorrect or wrong.

It is clear that the court's charge on "good faith" makes clear to the jury that defendants need not hold an objectively reasonable belief. We believe that the charge properly instructed the jury that a person's belief that he is acting appropriately does not have to be a reasonable belief in order to qualify as a "good faith" belief. Therefore, it is clear that [*20] the law of Powell, while not binding authority on this court, is satisfied with the court's instruction on "good faith." Moreover, we find that defendants' proposed charge on "good faith" is substantially covered in the court's charge, and that the charge as a whole fairly and adequately submits the issue of "good faith" to the jury.

As for the court's charge on defendants' reliance on their C.P.A., we again find that there was no abuse of discretion. Defendants contend that the court's charge could have led the jury to believe that defendants had the burden of proving that they sought the advice of an accountant and that they made fill [sic] and complete disclosure to the accountant. We disagree. The court's charge on reliance on the C.P.A. provided as follows:

> If before taking any action or failing to take any action, a defendant, while acting in good faith and for the purpose of securing advice on the lawfulness of his or her possible future conduct, sought and obtained the advice of a certified public accountant whom he or she considered to be competent, and made a full

> and accurate report or disclosure to the accountant of all important and material facts of which he or she had knowledge or had the means of knowing, and acted strictly in accordance with the advice the accountant gave following this full report or disclosure, then the defendant would not be willfully or deliberately doing wrong in performing or omitting some act the tax laws forbid or require ...

It is clear that there is no language whatsoever in the court's charge that indicates that it is defendants' burden to prove that they sought the advice of their accountant and that they made full disclosures to him. We agree with the government that the court's charge mirrors the defense used at trial. Accordingly, [*21]we find that the instruction fairly and adequately submits to the jury the issue of defendants' reliance on their C.P.A.

Defendants also contend that the court's instruction again fails to "make clear" that defendants need not hold an objectively reasonable belief that the advice of their accountant was correct. For the reasons stated with respect to our charge on "good faith," we find that the court's instruction "makes clear" to the jury that defendants' good faith reliance on their accountant need not be based upon an objectively reasonable belief.

CONCLUSION:

For all of these reasons, the court will deny defendants' motion for a new trial and motion for judgment of

acquittal pursuant to FED. R. CRIM. P. 33 and 29(c), respectively.

/s/
James F. McClure, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2212, 00-2238, 00-2422, and 00-2427

UNITED STATES OF AMERICA
Appellant at Nos. 00-2422 & 00-2427

v.

ROSEMARY DEPAOLI,
Appellant at No. 00-2212

FRANK KRESOCK,
Appellant at No. 00-2238

(D.C. Crim. Nos. 99-cr-00026-1 and 99-cr-00026-2)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and GREENBERG*, Circuit Judges, and FULLAM**, District Judge

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The petition for rehearing filed by appellants Rosemary DePaoli and Frank Kresock in the above-

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* As to panel rehearing only.

** The Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, who sat by designation, as to panel rehearing only.

Supreme Court, U.S.
FILED
APR 30 2003
OFFICE OF THE CLERK

No. 02-1272

In the Supreme Court of the United States

ROSEMARY DEPAOLI AND FRANK KRESOCK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in not instructing the jury that financial benefits received by an individual from a corporation do not constitute income until the amount of the benefits exceeds the amount owed by the corporation to the individual and that a corporation cannot generate dividend income in the absence of earnings and profits.

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In the Supreme Court of the United States

No. 02-1272

ROSEMARY DEPAOLI AND FRANK KRESOCK,
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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the Federal Reporter, but is available at 41 Fed. Appx. 543.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2002. A petition for rehearing was denied on September 26, 2002. Pet. App. 1c-2c. On December 20, 2002, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including February 24, 2003, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioners were each convicted on three counts of willfully attempting to evade income taxes, in violation of 26 U.S.C. 7201. DePaoli was also convicted on three counts of filing false corporate income tax returns, in violation of 26 U.S.C. 7206(1), and Kresock was convicted on three counts of aiding and assisting in the filing of false corporate income tax returns, in violation of 26 U.S.C. 7206(2). Gov't C.A. Br. 5-6. Kresock was sentenced to 20 months of imprisonment, to be followed by a three-year term of supervised release. DePaoli was sentenced to 16 months of imprisonment, to be followed by a three-year term of supervised release. Pet. App. 4a-5a. The court of appeals affirmed. *Id.* at 1a-17a.

1. Petitioners, husband and wife, are medical doctors who operated a medical practice through Columbia Medical Group, Inc. (CMG), a medical corporation they formed in 1988. Petitioners each owned one-half of the shares in CMG, and both acted as the corporation's employees, lessors, and creditors. They employed the certified public accounting firm of Herring & Roll to establish a system for compiling records in order to prepare and file individual and corporate income tax returns. Pursuant to the system, petitioners would send copies of CMG check stubs, bank statements, and payroll information to Herring & Roll on a monthly basis. Under the accounting system, petitioners were to add expense codes to the check stubs to enable

Herring & Roll to group and total the expenses at year end. Pet. App. 3a; Gov't C.A. Br. 6-8.

In 1995, a routine Internal Revenue Service (IRS) civil audit of CMG's 1993 corporate income tax return disclosed numerous suspicious deductions indicative of fraud. That led the IRS auditor to refer the case to the Criminal Investigation Division of the IRS. A criminal investigation revealed that, during the years 1992 through 1994, petitioners used CMG corporate checks to pay hundreds of thousands of dollars in personal expenses. Petitioners subsequently were indicted. Pet. App. 3a-4a; Gov't C.A. Br. 8-11.

The evidence at trial established that petitioners used CMG funds to purchase thousands of dollars worth of jewelry and guns, which were coded as "office supplies" on the check stubs provided to Herring & Roll. Petitioners also used CMG funds to purchase numerous vehicles, including a Ferrari Testarossa and Harley Davidson motorcycles. In addition, petitioners used corporate funds to renovate their vacation home, purchase gold coins, and pay for many personal items and services, including home furnishings, groceries, baby formula, diapers, child care, children's toys, a family cruise vacation, and maintenance expenses related to petitioners' homes. Petitioners also altered cash receipts that they submitted to CMG for reimbursement of business-related expenditures purportedly made on CMG's behalf. As a result, they improperly increased the business expense deduction on CMG's tax returns. Pet. App. 3a-4a; Gov't C.A. Br. 12-29.

On their individual income tax returns, petitioners did not report as income the CMG funds they used for personal expenditures. Instead, the expenses frequently were treated as business-related items that were deducted on CMG's corporate income tax returns.

Petitioners also failed to report as income on their personal tax returns fees they received for speaking engagements and for work they performed at a local hospital. Pet. App. 4a.

The evidence also established that petitioners took steps to conceal the personal nature of the corporation's expenditures by falsely coding the check stubs to make the expenses appear business related. For example, petitioner Kresock coded the purchase of several firearms as "yearly depreciable medical supplies" and coded the purchase of a Harley Davidson motorcycle as "equipment rental" for a cardiac echo machine. Gov't C.A. Br. 16; Pet. App. 4a.

2. In their proposed jury instruction, petitioners requested that the district court instruct the jury as follows:

> Whether a financial benefit received by an individual from a corporation such as Columbia Medical Group, Inc. is income that must be reported on that individual's personal income tax return depends upon the character of the benefit. If the benefit may have been repayment of a loan previously made by the shareholder to the corporation, it is not income to the shareholder and need not be reported on the shareholder's personal income tax return. In deciding whether the personal benefit which the government claims each defendant received as a result of the payment of personal expenses by Columbia Medical Group resulted in a substantial tax due, you must reduce the amount of the personal benefit received by the defendant by the amount the corporation owed that defendant.

C.A. App. 150. The district court declined to give the proposed instruction. Pet. App. 10a.

3. On appeal, petitioners argued, *inter alia*, that the district court erred in refusing to instruct the jury that corporate expenditures for the benefit of shareholders are not personal income unless the expenditures exceed all outstanding shareholder loans to the corporation and that a corporation cannot generate dividend income in the absence of earnings and profits. Pet. App. 10a. In support of that argument, petitioners principally relied on the Second Circuit's opinion in *United States* v. *D'Agostino*, 145 F.3d 69 (1998). The court of appeals rejected petitioners' claim, ruling that the district court had not erred in declining to give petitioners' requested jury instruction. Pet. App. 10a-13a.

The court explained that the Second Circuit's approach in *D'Agostino* "does not state the prevailing rule," and that its own decisions and those of a number of other courts of appeals reject the analysis in *D'Agostino*. Pet. App. 11a-12a. The court also emphasized that, unlike in *D'Agostino*, where the government had conceded that the defendant's corporation had no earnings or profits, "[h]ere, there was evidence supporting a conclusion that, when adjustments were made for personal items falsely labeled as business expenses, CMG showed a profit for each year charged in the indictment." *Id.* at 12a. Finally, the court observed that, whereas petitioners argued that the diverted funds could have been lawfully accounted for as a return of capital or repayment of a loan and that the company would have had little or no taxable income if it had treated the diverted funds as expenses through the issuance of 1099 forms, "there was no evidence from which it could be inferred that the diverted income was accounted for in this way." *Id.* at 12a-13a.

ARGUMENT

Petitioners renew their contention (Pet. 12-23) that the district court erred in declining to instruct the jury on their defense theory that a corporation cannot generate dividend income if it has no earnings and profits and that, in that event, funds paid to a shareholder should be treated as a nontaxable repayment of a loan or return of capital instead of dividend income as long as the payments do not exceed the amounts owed to (or invested by) the shareholder. Petitioners argue that the court of appeals' decision, in upholding the district court's refusal to give their requested jury instruction, conflicts with the Second Circuit's decision in *D'Agostino*, 145 F.3d at 69. Petitioners' argument lacks merit and does not warrant review.

The Second Circuit held in *D'Agostino* that, in a tax evasion case, corporate funds distributed to a shareholder constitute taxable income as a constructive dividend only to the extent that the corporation had earnings and profits for the tax year. 145 F.3d at 72-73. In the absence of earnings and profits, the court ruled, the distribution should be treated as a nontaxable return of capital or, if applicable, repayment of a loan. *Id.* at 72; see *United States* v. *Bok*, 156 F.3d 157, 162 (2d Cir. 1998). The Second Circuit's view fails to account for the fact that, under the Internal Revenue Code, the distribution of funds to a shareholder constitutes a dividend not only when the payment comes from the corporation's "earnings and profits of the taxable year," 26 U.S.C. 316(a)(2); see *Bok*, 156 F.3d at 162, but also if the funds come from "earnings and profits accumulated" over previous years, 26 U.S.C. 316(a)(1). In addition, whereas the Second Circuit has indicated that it is irrelevant whether the taxpayer and corporation intend

for the distribution to constitute a return of capital or loan repayment rather than a dividend or account for the distribution as such, see *Bok*, 156 F.3d at 162-163; *D'Agostino*, 145 F.3d at 72-73, it is well settled that, "while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice * * * and may not enjoy the benefit of some other route he might have chosen to follow but did not." *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 148-149 (1974).

In any event, even under the Second Circuit's approach, petitioners' requested jury instruction was correctly denied. A requested theory-of-defense instruction must correctly state the law and have a sufficient evidentiary foundation in the record. See, *e.g.*, *Mathews* v. *United States*, 485 U.S. 58, 63 (1988); *United States* v. *Johnson*, 278 F.3d 749, 752 (8th Cir.), cert. denied, 536 U.S. 949 (2002); *Bok*, 156 F.3d at 163. Petitioners' requested instruction fails on both counts.

First, as to whether the instruction correctly stated the law in the Second Circuit, a distribution by a corporation to a shareholder may be treated as a return of capital or repayment of a loan under *D'Agostino* only if the corporation lacked earnings and profits for the tax year in question. 145 F.3d at 72; see *Bok*, 156 F.3d at 162 ("A central condition for the application of the return of capital theory * * * is that the corporation must not have earned a profit for the year in which the withdrawal was made."). Petitioners' proposed instruction, however, failed to condition the reduction of "the amount of the personal benefit received by the defendant by the amount the corporation owed that defendant" (C.A. App. 150) on the absence of corporate earn-

ings and profits. In fact, the requested instruction makes no mention of CMG's earnings and profits.

In addition, there was an inadequate factual basis in the record for petitioners' requested instruction. The Second Circuit requires the defendant to produce evidence showing the absence of corporate earnings and profits. *Bok*, 156 F.3d at 163-164. As the court of appeals observed in its opinion, in *D'Agostino*, unlike this case, it was undisputed that the corporation lacked earnings and profits. Pet. App. 12a. Petitioners argue (Pet. 17) that there was evidence from which the jury could have concluded that CMG lacked earnings and profits, citing two transcript pages (11/19/99 Tr. 112-113) from the direct testimony of a defense accounting expert. The witness, however, did not testify that CMG lacked earnings and profits for the relevant tax years. Instead, he testified hypothetically that, "If [CMG] had issued 1099s, the 1099 would have been deductible by the corporation, assuming the deductions were proper, and the 1099 issuance would have created the expenses which would then result in the corporation having no taxable income or very little taxable income." 11/19/99 Tr. 113. As the court of appeals explained, "there was no evidence from which it could be inferred that the diverted income was accounted for in this way." Pet. App. 12a-13a. The expert's testimony thus does not assist petitioners.

Moreover, the distributions to petitioners could not in fact have been deducted by the corporation for purposes of determining whether they constituted dividend income to petitioners. The Second Circuit's decisions rely on the provisions in the Internal Revenue Code defining corporate distributions and dividends, see *Bok*, 156 F.3d at 162; *D'Agostino*, 145 F.3d at 72, and under those provisions, a distribution constitutes a

dividend if it comes from the corporation's earnings and profits for the tax year, "computed as of the close of the taxable year *without diminution by reason of any distributions made during the taxable year.*" 26 U.S.C. 316(a)(2) (emphasis added). Therefore, even under the Second Circuit's approach, the court of appeals correctly rejected petitioners' assertion that the district court should have instructed the jury on their defense theory. See *Bok*, 156 F.3d at 163-164 (instruction on return of capital theory not required, because defendant failed to satisfy his burden of producing evidence of absence of corporate earnings and profits); see also *United States* v. *Leonard*, 524 F.2d 1076, 1083-1084 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2003

(3)

Supreme Court, U.S.
FILED
MAY 20 2003
OFFICE OF THE CLERK

No. 02-1272

IN THE
SUPREME COURT OF THE UNITED STATES

ROSEMARY DePAOLI
and FRANK KRESOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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May 2003

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ARGUMENT IN REPLY

Rosemary DePaoli and Frank Kresock have petitioned this Court for a writ of certiorari to review the judgment and opinion of the Third Circuit. The court below held that to convict them of tax evasion, the government did not have to prove their unreported receipts were, under the Internal Revenue Code, taxable as "income." The respondent does not deny that there is an entrenched split in the circuits over this question. Nor does the respondent attempt to defend in any way the reasoning or conclusion of the court below or of the other circuits it followed. The Brief in Opposition takes a different tack: it refuses to address the question presented,[1] and instead advances several arguments -- none of them raised by the government in the trial court or in the court of appeals, nor by either court *sua sponte* -- in support of its theme that the question proposed in the Petition is not presented on the facts and record of this case. Because the respondent's attempts to avoid the question presented miss the mark, the petition should be granted.

The brief in opposition ("Br.Opp.") proposes two reasons why certiorari should be denied. First, the respondent attacks the legal correctness of the Second Circuit rule on which the petitioners relied below, and which they advocate before this Court. Br. Opp. 6-7. Second, the respondent contends that for various reasons

[1] The respondent also proposes a revision of the Question, Br.Opp. (i), to make it seem more fact-specific and the case accordingly less worthy of this Court's attention. The Question Presented in the Petition, of course, is the one the Court would and should address if the writ is granted.

arising from the record of this case, the Second Circuit rule was either not available to petitioners or would not have benefited them even if it had been applied. Br.Opp. 7-9. These contentions are not persuasive and do not justify denial of the petition.

1. The Second Circuit's *Leonard-D'Agostino* rule is correct, both under the law of taxation of corporate dividends and as a general matter of criminal tax evasion law, although other circuits disagree.

Petitioners' defense to the tax evasion counts was built in part around their reliance on the decision in *United States v. D'Agostino*, 145 F.3d 69 (2d Cir. 1998). The *D'Agostino* opinion does not founder on any careless failure by those judges to read and apply the applicable provision of the Internal Revenue Code, as the respondent appears to suggest. Br.Opp. 6, pointing to 26 U.S.C. (IRC) § 316(a)(1) (dividend is corporate disbursement to shareholder out of "earnings and profits," which may have accumulated in prior years).[2] Rather, *D'Agostino* follows Judge Friendly's leading decision in *United States v. Leonard*, 524 F.2d 1076, 1083-84 (2d Cir. 1975), and it was followed in turn by *United States v. Bok*, 156 F.3d 157, 161-64 (2d Cir. 1998). The fact that subsection 316(a)(1) was not separately discussed in *Leonard*, *D'Agostino* or their progeny in no way suggests the case was wrongly decided. In none of those cases was there the slightest suggestion that the corporation in question

[2] This statute was fully quoted and set forth in the Statute Involved section of the Petition. No one overlooked it, as the United States now implies.

had retained any accumulated "earnings and profits" from prior years, such that § 316(a)(1) might be in issue.

Nor was there any evidence or suggestion of accumulated prior-year profits in this case. Like virtually every small, family-owned corporation, professional or otherwise, Columbia Medical Group distributed all its income every year; if it had any extra, the record shows, it would grant bonuses or adjust the owners' loan accounts, not accumulate profits.[3] The books and records of CMG were all in the hands of the IRS and the U.S. Attorney's Office prior to and during trial. Neither the prosecutor nor any witness suggested that CMG had accumulated profits under § 316(a)(1). To cite that little-utilized provision[4] as if it were the secret Achilles heel of the *D'Agostino* doctrine is much ado about nothing.

Nor does the *D'Agostino* doctrine run afoul of the rule that taxpayers must live with the tax consequences, intended or otherwise, of their voluntary business choices. *See* Br.Opp. 7, quoting *Comm'r of Int. Rev. v. National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 148-49 (1974). The issue here concerns the treatment on petitioners' joint individual tax return(s) of the value of personal expenses paid for their benefit by their professional corporation. On the personal returns, as filed, the value of those benefits was not declared as income. This

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[3] To do otherwise is absurd; it only results in the proverbial "double taxation" which results from the application of a corporate income tax and then the individual income tax on the same profits when later distributed.

[4] *See* Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶8.02[4], at 8-14 to -15 (7th ed. 2000 & 2001 Supp.).

conduct can give rise to a prosecution for tax evasion under 26 U.S.C. § 7201 only if, *inter alia*, this omission evidences an attempt to evade "a tax imposed by this title." *Id.*

Is a tax imposed by Title 26 on such amounts? Only if they were received by the owners as miscellaneous (imputed) income or as (constructive) dividends. There would be no tax due, and thus no evasion, if the corporation's covering the owners' expenses served to reduce a loan balance existing in their favor as the corporation's creditors, for example. (There was unconstested evidence that a signficant loan balance of that kind existed in this case.) Nor is the undeclared value taxable as "income" if it constituted a return of capital, rather than dividends, where the corporation had no "earnings and profits." Boris I. Bittker & James S. Eustice, *Federal Income Taxation of Corporations and Shareholders* ¶8.02[5], at 8-15 to -17 (7th ed. 2000 & 2001 Supp.).

Nothing about the mischaracterization of the payments on the corporation's tax returns inevitably leads to one result or the other on the owners' personal returns, where the payments were not characterized at all. If CMG's accountant had characterized the corporation's expenditures on behalf of its owners as "loans," or as "advances" on anticipated bonuses, or as repayments of existing loans to the corporation, then one or another tax consequence would flow from that characterization, assuming the actual facts were consistent with it. *Higgins v. Smith*, 308 U.S. 473, 477 (1940). But here there was no characterization. The issue is purely statutory, as the Second Circuit's cases rightly hold.

If the distributions to the owners during the year came out of the corporation's "earnings and profits,"

viewed in retrospect as of the end of the year, they amounted to taxable dividends. IRC § 316(a)(2). If the corporation had no "earnings and profits" that year (and hadn't paid the expenses out of prior-year accumulated earnings and profits, *id.* § 316(a)(1)), then the value of the payments constituted a return of capital, or a repayment of loans, and in either event did not create taxable income. The appearance (or bookkeeping characterization) of the expenditure, when made, may have to be altered after the fact, depending upon whether the corporation, when the year is done, is found to have had "earnings and profits." Bittker & Eustice, *supra* ¶8.02[2], at 8-12. Since the existence of a "deficiency" *vel non* depended in this case on that fact, the matter should have gone to the jury, as the defense requested.

The Second Circuit cases, as the defense contended at trial and on appeal, state the law correctly -- both the law of income taxation and the law of criminal tax evasion. The other circuits which disagree, followed by the court below, do so on illogical and indefensible grounds, as the Petition shows (pp. 17-21). Indeed, the total absence of any effort by the United States to defend the reasoning of the anti-*D'Agostino* circuits (including that of the court below) speaks volumes. The split in the circuits is real, the rule on which petitioners rely easily survives the pot-shots that the respondent directs at it,[5] and the conflicting, majority position -- endorsed by the court below -- does not withstand even modest scrutiny. Accordingly, the writ should be granted.

[5] Even if the Second Circuit analysis were wrong, that would be no reason to deny certiorari. The Court should still grant certiorari to see that the correct rule is followed in all circuits.

2. The respondent's attempts to find flaws in the record to avoid a grant of *certiorari* in this case have no merit.

The respondent opposes a grant of certiorari in this case on several other trivial and erroneous bases, all in attempted avoidance of the merits. First, it contends that the petitioners' requested jury instruction on the *D'Agostino* issue misstated the law, even under the Second Circuit's view. Br.Opp. 7-8. Neither the prosecutor nor the district court objected to the proposed instruction on this basis. *See* CA3 App. 169-70. The trial court never got as far as the precise phraseology of the requested instruction because it rejected the entire referenced principle out of hand. Likewise, the respondent's present point was never made by the government before the court of appeals, nor by the appellate panel in its decision. Arguments that should have been raised during trial, that is, at the charging conference, but were not, are not appropriately raised for the first time in this Court. See *Steagald v. United States*, 451 U.S. 204, 209 (1981) (principle applied against the government by this Court in a criminal case); accord, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

The respondents' second fact-specific point is the claim that "there was an inadequate factual basis in the record for petitioners' requested instruction." Br.Opp. 8. This contention is based only on the brief passage cited in the petition. But in addition to the oral testimony, the evidentiary record at trial included CMG's records and those of its accountant.[6] From all the documents, and in

[6] The government's trial exhibits, frequently referred to before the jury by all parties with several witnesses, included CMG's

light of the accountancy testimony, the jury could easily have concluded that the corporation lacked "earnings and profits" in each relevant year, and that it had accumulated none in prior years.[7]

Finally, the respondent attempts to dispute the defense expert's testimony that the corporation actually had no "earnings and profits," by claiming he made a fundamental mistake. Respondent asserts that the defense expert -- a CPA who was a retired, long-time, supervisory IRS examination agent -- wrongly in his hypothetical analysis deducted the corporation's distributions to petitioners prior to computing the "earnings and profits." Br. Opp. 8-9, citing 26 U.S.C. § 316(a)(2).

But the defendant's expert did not make the basic mistake charged to him by the respondent. The expert stated that if CMG "had issued 1099s, *the 1099 would have been deductible* by the corporation, assuming the deductions were proper, and the 1099 issuance would have created the *expenses* which would then result in the corporation['s] having no taxable income ...." 11/19/99 Tr. 113. In other words, the corporation took no deductions to which it was not entitled; it simply recorded them

(cont'd)

cash disbursements journals, general ledgers and financial statements for the years in question, as well as its tax returns. Gov't Exh. 21-29.

[7] Respondent repeats the Third Circuit's endorsement of the district court's attempt to distinguish *D'Agostino* on the basis that the government had conceded there that the corporation had no "earnings and profits." Br.Opp. 5. Understandably, however, respondent does not actually try to defend the proposition that the defense is not entitled to a jury instruction relating to factual issues which are reasonably in dispute.

inaccurately, apparently for the convenience and benefit of the owners. The expert's references to "1099s" -- the number of the IRS form on which a business reports the payment of miscellaneous income (beyond salary), rents (to the petitioners in their capacity as CMG's landlord), interest on loans, or cancellation of debt, *inter alia* -- coupled with his reference to "expenses" (that is, "ordinary and necessary [business] expenses" of the corporation under IRC § 162(a)) suggest that the expert was referring to payments of kinds other than dividends which, because they *do* constitute deductible expenses, *do* reduce or (very often) eliminate the margin of a corporation's "profit."

This has nothing to do with the circuit split over whether an "earnings and profits" analysis is appropriate before charging a defendant with failure to report constructive dividends. On that score, the defense expert was correct; CMG had little or no taxable income on the same basis that it had no "earnings and profits." Section 316 quite clearly is concerned only with "distributions" made during the year, not with other sorts of "expenditures." (The requirement to disregard any distributions made during the year avoids circularity and thus undermeasurement of the profits.) There is no reason to suppose that the defense expert was so ignorant or careless that he would have been referring in this passage to payments of *dividends* made during the year (that is, to "distributions") -- which would indeed have been erroneous.[8]

[8] Surely, if the prosecutor at trial had thought the defendant's expert was vulnerable to attack on so basic a matter of tax knowledge, he would have made a point of it on cross-examination, or would have called a rebuttal witness. But in

In short, the respondent not only fails to discuss or dispute the genuine split in the circuits on the important issue of criminal tax law presented, it tries to avoid this Court's addressing the issue in the present case with fact-specific claims which are not borne out by the record and which were never advanced by the government in either court below. In all these ways, the respondent's position falls short. The petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in the petition itself, this Court should grant the petition of Rosemary DePaoli and Frank Kresock for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit upholding their convictions for attempted evasion of income tax.

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May 15, 2003

_____(cont'd)
fact the prosecutor did neither. *See* 11/19/99 Tr. 118-33 (cross-examination); 11/30/99 Tr. 118 (no rebuttal).